Supreme Court, U.S.
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No. 95-999

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1995

SECURITY MANAGEMENT CORP.,
*Petitioner,*

v.

BALTIMORE COUNTY, MARYLAND,
*Respondents.*

**PETITION FOR WRIT OF CERTIORARI**
**TO THE**
**COURT OF SPECIAL APPEALS OF MARYLAND**

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## QUESTIONS PRESENTED

1. DO ZONING ACTIVITIES OF LOCAL JURISDICTIONS COME WITHIN THE PURVIEW OF THE TAKINGS CLAUSE OF THE FIFTH AMENDMENT AS APPLIED TO THE STATES BY THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION?

2. DOES DENIAL OF A REZONING REQUEST OF A LONG-TIME PROPERTY OWNER/INVESTOR FOR A PROPERTY SURROUNDED BY HIGH DENSITY ZONING, WHICH DENIAL SUBSTANTIALLY LIMITS THE USE OF THE PROPERTY BUT DOES NOT DENY ALL ECONOMIC USE THEREOF, CONSTITUTE A TAKING UNDER THE FIFTH AMENDMENT AS APPLIED TO THE STATES BY THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION?

3. DID BALTIMORE COUNTY FAIL TO SATISFY ITS BURDEN UNDER THE "ROUGH PROPORTIONALITY" TEST SET FORTH IN DOLAN V. CITY OF TIGARD WHEN PETITIONER'S COMPLAINT WAS DISMISSED, WITHOUT SUBMISSION OF ANY EVIDENCE FROM THE COUNTY CONCERNING THE REQUIRED NEXUS BETWEEN THE ZONING DENIAL AND THE LEGITIMATE INTERESTS OF THE COUNTY?

## PARTIES TO THE PROCEEDING

The parties to the proceeding in the Court of Special Appeals of Maryland are those in the caption.

Petitioner, Security Management Corp., is owned equally be Victor Posner, Steven Posner, and Gail Posner. Additionally, Security Management Corp. wholly owns the following entities:

Ambassador Motel, Inc.
Augusta Realty, Inc.
Clapon, Inc.
Crescent, Inc.
Durand Realty, Inc.
East Rock Apts., Inc.
Glenmont Apts., Inc.
Missouri Realty, Inc.
National Planned Communities, Inc. (FLA)
National Planned Communities, Inc. (MD)
Raven Holding Corp.
Riteway Realty, Inc.
Town and Beach Tower Apts. Inc.
Miami Country Club of Miami, Inc.
Miami Holding Corp.
Executive Point, Inc.
Lawrence Lockwood, Inc.
Resources Unlimited
Universal Management Corp.
Universal Housing & Development Co.
Universal Housing Corp.
The Laurels, Inc.
Worldwide Luxury Homes, Yachts & Planes Sales & Related Services, Inc.

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v.

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No.

*Supreme Court of the United States*
October Term, 1995

SECURITY MANAGEMENT CORP.,

*Petitioner,*

- against -

BALTIMORE COUNTY, MARYLAND,

*Respondent.*

**PETITION FOR WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND**

Petitioners herein respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Court of Special Appeals of Maryland entered in this action on March 31, 1995.

## OPINIONS BELOW

The decision of the Circuit Court for Baltimore County, Maryland dated February 23, 1994, granting the Respondent's Motion to Dismiss; the opinion of the Court of Special Appeals of Maryland dated March 31, 1995, affirming the lower court's ruling [the decision is reported at 104 Md. App. 234, 655 A.2d 1326(1994)]; and the Order of the Court of Appeals of Maryland dated September 13, 1995 denying the Petition for Certiorari are included in the Appendix incorporated within this Petition.

## BASIS FOR JURISDICTION

Upon consideration of the Petition for Writ of Certiorari to the Court of Special Appeals of Maryland, and the responses filed thereto, the Court of Appeals of Maryland denied Petitioner's Petition for Writ of Certiorari on September 13, 1995. The jurisdiction of this Court is, accordingly, invoked pursuant to 12 U.S.C. § 1257.

## STATEMENT OF THE CASE

In the late 1960's, Petitioner's corporate affiliate purchased the subject 215-acre parcel of real property as part of a larger tract, located in the Hunt Valley area of Northern Baltimore County, Maryland, for the purpose of developing a residential subdivision of mixed density structures (the "Property"). The Property, originally purchased because it was zoned to accommodate such a residential subdivision, was rezoned in

1976 to a density level which prevented its planned use. Other adjoining landowners began development of their properties in approximately 1974, which development continued up through the 1990's. With the exception of the Petitioner, all of the other adjacent landowners, who had purchased their property for residential and commercial development, were granted high density zoning and were permitted to develop in accordance with their original investment-backed expectations.

In 1992, during Baltimore County's Comprehensive Rezoning Process, Petitioner submitted to the Baltimore County Council a petition requesting that the Council rezone the Property to accommodate a residential subdivision with mixed density structures. Under the plan submitted with the petition, the Petitioner proposed to build approximately 3,000 dwelling units, including townhomes, multi-family homes, and housing for the elderly, which would have been constructed in phases over a 15-year period at a rate of 200 units per year.

Under present zoning, Petitioner would only be permitted to build forty-three (43) dwelling units on the Property, such units being clustered on thirty (30%) percent of the Property, leaving seventy (70%) percent of the Property in its natural, undeveloped state. On October 15, 1992, the County Council denied Petitioner's zoning request.

In April, 1993, Petitioner filed the present suit in the Baltimore County

Circuit Court. In its Complaint, Petitioner asserted that:

a. the planned development would be an environmentally sensitive community that meets all State, County and Federal requirements regarding wetlands, flood plains, steep slopes, erodible soils and forestation;

b. that the County already had water and sewer service adequate to meet the needs of the planned development, and that water and sewerage planning in the late 1960's envisioned higher demands for this area than the current level of need[1];

c. that the planned development was in accord with the Master Plan adopted by the County Council;

d. that the planned development would fill a documented and substantial need for housing in the area, particularly including affordable housing and housing for the elderly;

e. that Baltimore County's school system would possess more than enough capacity to accommodate

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[1] Petitioner, among many others, was a party to a water and sewer hookup agreement with Baltimore County, Maryland, dating from 1969 wherein Petitioner, inter alia, paid into a fund which was used to actually extend water and sewer lines to the Property and to other landowners in the immediate vicinity.

children from the planned development; and

f. that the planned development would actually improve water quality in the area and would **reduce** pollutant-loading to the adjacent Loch Raven Reservoir. (Emphasis added).

Petitioner's Complaint alleged that the Respondent's refusal to rezone the property violated Petitioner's Federal and State constitutional rights. Specifically, Petitioner alleged that it has been denied equal protection of the laws in contravention of the Fourteenth Amendment of the United States Constitution and 42 U.S.C. § 1983, and that its rights under Article 24 of the Maryland Declaration of Rights have been violated. Petitioner also alleged that retention of the Property within the currently existing zoning regulations constitutes a taking without just compensation within the meaning, and in violation, of the Fifth Amendment as applied to the State of Maryland by the Fourteenth Amendment of the United States Constitution, 42 U.S.C. § 1983 and Art. III, §§ 40 and 40A of the Maryland Constitution. The Petitioner now seeks a Petition for a Writ of Certiorari to the Court of Special Appeals of Maryland to review that Court's ruling affirming the Circuit Court of Baltimore County's dismissal of Petitioner's Complaint alleging that Baltimore County's action constituted a taking without just compensation in violation of the Fifth Amendment of the United States Constitution.

## REASONS FOR GRANTING THE WRIT

### I.

### THIS CASE PRESENTS AN IMPORTANT QUESTION OF LAW REGARDING THE EXTENT TO WHICH GOVERNMENT ENTITIES CAN REGULATE THE USE OF PRIVATE PROPERTY BEFORE SUCH REGULATION CONSTITUTES A "TAKING" FOR WHICH THE PROPERTY OWNER MUST BE COMPENSATED.

This case presents the important question of to what extent government regulation can limit a property owner's use of its property before such regulation will be deemed a "taking" under the United States Constitution, thereby compelling the government to compensate the owner. Any discussion of a takings claim necessarily begins with the Fifth Amendment of the United States Constitution, which contains the mandate: ". . .nor shall private property be taken for public use, without just compensation." U.S. Const. Amend. V.

At the time the Constitution was written, and for almost 150 years thereafter, the Court's concern was with physical occupation of private lands by the government. However, in 1922, in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), Justice Holmes stated the oft-quoted proposition: "[t]he general rule at least is that while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking." Id. at 415.

In 1926, the then innovative and rapidly spreading practice of State regulation of private land use through

zoning was challenged as fundamentally having taken regulation "too far." The Supreme Court, in part by analogizing zoning to the historic common law control of nuisances, upheld, against a charge of facial invalidity, the power of government to enact and implement zoning laws. Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). However, the Court noted that in an individual case, a zoning rule as applied to a specific tract of land could violate the protections provided by the Constitution. Id. at 395. Two years later, the Court struck down the specific application of a Cambridge, Massachusetts zoning ordinance to a particular piece of property as violative of the Fifth Amendment. Nectow v. City of Cambridge, 277 U.S. 183 (1928). "The governmental power to interfere with the general rights of the landowner by restricting the character of his use, is not unlimited, and other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare." Id. at 188.

After a 50-year hiatus from these issues, the Court, in 1978, re-entered the debate by defining the notion of when a regulation goes "too far." Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978). The Court held that three criteria would determine the outcome: (1) the character of the governmental action, (2) the economic impact of the regulation on the claimant, and (3) the extent to which the regulation interfered with the property owner's distinct investment-backed expectations. Id. at 124. This Court has opined that land use

regulation can affect a taking if it "does not substantially advance legitimate state interests . . . or denies an owner economically viable use of [its] land." Keystone Bituminous Coal Ass'n v. Debenedictis, 480 U.S. 470, 485 (1987).

## II.

## THE DENIAL OF A REZONING REQUEST OF A LONG-TIME PROPERTY OWNER/INVESTOR FOR A PROPERTY SURROUNDED BY HIGH DENSITY ZONING, WHICH SUBSTANTIALLY DENIES THE OWNER/INVESTOR ITS DISTINCT INVESTMENT-BACKED EXPECTATIONS (BUT NOT OF ALL USE THEREOF), CONSTITUTES A TAKING UNDER THE FIFTH AMENDMENT.

In its decision affirming the dismissal of Petitioner's Complaint, the Court of Special Appeals of Maryland held that Petitioner overlooked the important modifier "all" when it argued that a regulation may constitute a taking if it denies the owner the economically beneficial use of its land. Security Mgmt. v. Baltimore County, 104 Md. App. 234, 242, 655 A.2d 1326, 1330 (1994). The Court noted a prior Maryland Court of Appeals' decision, Waters v. Montgomery County, 337 Md. 15, 650 A.2d 712 (1994), which held that, under Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992), a regulation does not go "too far" unless it "denies ***all*** economically beneficial and productive use of land." (Emphasis added.) Waters, 337 Md. at 40, 650 A. 2d at 724, quoting Lucas, 112 S. Ct. at 2893. This reading of Lucas and its progeny by the Court of Special Appeals of Maryland is incorrect.

In Lucas, the Plaintiff purchased two ocean front lots with the intention of building a home for himself on one, and a home for sale on the other. Between the time he purchased the lots and the time he was ready to develop, South Carolina had enacted legislation aimed at preserving and protecting the fragile ecology of the beach and dune area. Pursuant to that regulation, a state agency determined that no buildings could be constructed oceanward of a line drawn on the upland side of the Plaintiff's property, thus precluding the Plaintiff from building on his property. Id. at 2889-90.

There was no question in Lucas that the Plaintiff had distinct investment-backed expectations for his property. And despite the State's argument that the Plaintiff still retained the untrammeled right to use his property to view the waves and to cross upon it to the beach, there was little doubt that the economic value of his property had been essentially destroyed by the regulatory imposition. Id. at 2896.

The Court reasserted its holding in Penn Central by noting that the Fifth Amendment is violated when land use regulation "does not substantially advance legitimate state interests or denies an owner economically viable use of [his] land." Id. at 2894. The Court went on to further hold that since the Plaintiff had been called upon to sacrifice all economically beneficial use of his land in the name of the common good, that is to leave his property

economically idle, he did suffer a taking. Id.

Justice Stevens, writing separately, criticized as arbitrary the notion that "[a] landowner whose property has diminished in value 95% recovers nothing, while an owner whose property is diminished 100% recovers the land's full value." Id. at 2919 (Stevens, J. dissenting). In response, Justice Scalia, writing for the Court, noted that Justice Stevens' analysis "errs in its assumption that the landowner whose deprivation is one step short of complete is not entitled to compensation." Id. at 2894, n.8. In fact, Lucas represents the only time this Court has used the term "all" in conjunction with the standard test for determining whether a regulation goes "too far" and is therefore in violation of the Fifth Amendment. Presumably, Justice Scalia's comments in footnote 8 indicate that the use of the term "all" was merely inserted by the Court because of the unique circumstances at issue (a case where ALL use, in fact, was taken), and did not represent a change in the standard which courts should use to analyze takings claims.

The Court has indirectly been confronted with the issue of whether "all" economic value must be deprived before a landowner is entitled to compensation on a number of occasions. In Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987), the Court considered whether the California Coastal Commission's refusal to grant the Nollans' coastal development permit to construct a seaside bungalow unless they agreed to grant a public easement to pass

in front of the bungalow constituted a taking. The Court affirmed the traditional standard that a land use regulation does not affect a taking if it substantially advances a legitimate state interest and does not deny an owner economically viable use of its land, and held that the exaction of an easement across the Nollans' property for beach access was totally unrelated to the interests sought to be advanced, i.e., protecting visual access to the ocean. Id. at 840. The Court emphasized that "our cases describe the condition for abridgment of property rights through the police power as a 'substantial advancing' of a legitimate state interest." Id. at 841.

In light of the Court's finding that the Commission's action did not substantially advance a legitimate state interest, the Court never considered whether the Commission's action deprived the Nollans of the economically viable use of their land. The Coastal Commission's regulation was held to be in violation of the Fifth Amendment, even though the Nollans retained a substantial percentage of their beachfront property to construct a new home. See also Dolan v. City of Tigard, 114 S. Ct. 2309 (1994)(holding that a taking did occur even though the Petitioner was able to derive substantial economic use from her property).

Moreover several federal appellate courts have confronted this precise issue. The Eleventh Circuit, in Reahard v. Lee County, 968 F.2d 1131 (11th Cir. 1992), considered the Reahards' contention that the promulgation of the

Lee County, Florida comprehensive land use plan affected a taking of their 40-acre waterfront property. The land use plan limited development of the Reahards' parcel to a single residence, or to uses of a recreational, open space, or conservation nature. Id. at 1113. Obviously, forty (40) acres of prime waterfront property with direct river access to the Gulf of Mexico which could be developed with a single residence was not worthless or useless land.

The Eleventh Circuit did not simply conclude, however, that the Richards were not entitled to just compensation merely because they did retain economically viable use of their land. In fact, the Eleventh Circuit specifically noted that the Reahards' taking claim should be evaluated according to the ad hoc formula utilized in the Penn Central case. In this regard, the Eleventh Circuit found that the trial court had failed to undertake the kind of analysis required by Penn Central and remanded the case for further consideration. Specifically, the Court held:

> In the instant case, the magistrate judge, serving as factfinder, did not analyze the factors noted above, nor did he set forth the factual findings necessary for such an analysis. In this context, a proper takings analysis would address a number of questions. In this case those questions are: 1) the history of the property - when was it purchased? How much land was purchased? Where was the land located? What was the nature of title? What was the composition of

> the land and how was it initially used?; 2)the history of development - what was built on the property and by whom? How was it subdivided and to whom was it sold? What plats were filed? What roads were dedicated?; 3) the history of zoning and regulation - How and when was the land classified? How was use proscribed? what changes in classification occurred?; 4) how did development change when title passed?; 5) what is the present nature and extent of the property?; 6) what were the reasonable expectations of the landowner under state common law?; 7) what were the reasonable expectations of the neighboring landowners under state common law?; and 8) perhaps most importantly, what was the diminution in the investment-backed expectations of the landowner, if any, after passage of the regulation? Once such factors are determined, an application of these facts under the Penn Central multi-factor inquiry would follow.

Id. at 1136. This type of analysis, the Court held, must be engaged in by the trial court even though less than all was taken and the Reahards could still derive some economic benefit from the property after passage of the zoning restriction.

In Florida Rock Indus., Inc. v. United States, 18 F.3d 1560 (Fed. Cir. 1994), the Federal Circuit confronted the issue of whether a partial deprivation resulting from a regulatory imposition, that is, a situation in which a regulation which deprives the owner of a

substantial part but not necessarily all of the economic use or value of the property, constitutes a "taking," and is compensable as such. After a review of Lucas, the Federal Circuit noted that an essentially ad hoc inquiry must be undertaken pursuant to takings jurisprudence, and that there is no bright line dividing compensable from non-compensable exercises of the government's power when a regulatory imposition causes a ***partial*** loss to the property owner. Id. at 1570.

It is for the trial court, as an initial matter, to determine whether a governmental entity acted within its proper role under the particular circumstances. Id. A trial court must consider: 1) whether there are direct compensating benefits accruing to the property, and others similarly situated, flowing from the regulatory environment, or are benefits, if any, general and widely shared through the community and society, while the costs are focused on a few?; and 2) whether there are alternate, permitted activities, economically realistic in light of the setting and circumstances, and are such activities realistically available? Id. at 1571. In short, a trial court must determine whether the government acted in a responsible way, limiting the constraints on property ownership to those necessary to achieve the public purpose, and not allocating to some number of individuals, less than all, a burden that should be borne by all. Id.

Finally, in Florida Rock, the majority took exception with the dissent's assertion that Supreme Court precedent

established that a Fifth Amendment claim that specific property has been taken is an all-or-nothing proposition. Id. "If taken to mean that a regulatory taking cannot result in less than a taking of the property owner's entire fee estate, we cannot agree." Id. at 1572. There has never been any question but that the government can take any kind of recognized estate or interest in property it chooses in an eminent domain proceeding; it is not limited to fee interests. Id. See also Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed. Cir. 1994)(holding that a taking may have occurred when permits to build single family homes on 12.5 acres of a 51-acre parcel were denied).

A thorough review of takings jurisprudence demonstrates that, contrary to holdings of the Court of Appeals of Maryland and the Court of Special Appeals of Maryland, the U.S. Constitution does not require a showing that a land use regulation must deny a landowner ***all*** economically beneficial productive use of its land to be in violation of the Fifth Amendment. To permit a contrary standard to continue wrongly allows the government to violate the intent and meaning of the Fifth Amendment when it imposes regulations upon landowners which substantially limit, but do not deny all, economically viable uses of land without payment of compensation therefor.

## III.

## DISMISSAL OF PETITIONER'S COMPLAINT IMPROPERLY RELIEVED BALTIMORE COUNTY OF SATISFYING ITS BURDEN UNDER THE "ROUGH PROPORTIONALITY" TEST, SET FORTH IN *DOLAN V. CITY OF TIGARD*, OF MEETING AN EVIDENTIARY BURDEN CONCERNING THE REQUIRED NEXUS BETWEEN THE ZONING DENIAL AND THE LEGITIMATE INTERESTS OF THE COUNTY.

Despite Petitioner's assertions that courts have repeatedly disapproved of the resolution of takings issues without, at minimum, a preliminary evidentiary hearing, and the Supreme Court's holding that regulatory takings jurisprudence must be determined by engaging in "essentially ad hoc, factual inquiries", Penn Central, supra; the Court of Special Appeals of Maryland upheld the Circuit Court for Baltimore County's dismissal of the Petitioner's Complaint for failing to state a claim upon which relief could be granted. See Naegele Outdoor Advertising, Inc. v. Durhman, 844 F.2d 172, 176-77 (4th Cir. 1988)("resolution of the dispute [regarding the impact of the contested government action] by preliminary hearing rather than by summary judgment is particularly important involving claims of regulatory taking"); Hall v. Santa Barbara, 833 F.2d 1270, 1274 (9th Cir. 1986), cert. denied, 485 U.S. 940 (1988)("in resolving claims for inverse condemnation, the Supreme Court has admitted its inability to develop any 'set formula' for determining when compensation should be paid, resorting instead to 'essentially ad hoc factual inquiries to resolve the question.'"); Lockary v. Kayfetz, 917

F.2d 1150, 1155 (9th Cir. 1990)(". . .the determination of what constitutes an economically viable use of land requires a case-by-case factual analysis of the particular circumstances presented."). Not only did this dismissal fail to recognize the general requirement that trial courts refrain from resolving such claims without a plenary hearing, it also circumvented the Supreme Court's recent decision in Dolan v. City of Tigard, supra, which set forth the "rough proportionality" standard encapsulating the requirements of the Fifth Amendment.

In Dolan, the Court held that under the well-settled doctrine of "unconstitutional conditions," the government may not require a person to give up a constitutional right - here the right to receive just compensation when property is taken for public use - in exchange for a discretionary benefit conferred by the government where the property sought has little or no relationship to the benefit. Dolan, 114 S. Ct. at 2316. See also Perry v. Sindermann, 408 U.S. 593 (1972); Pickering v. Board of Ed., 391 U.S. 563, 568 (1968). In evaluating such a claim, a court must first determine whether the "essential nexus" exists between the "legitimate state interest" and the condition exacted by the governmental entity. Id. See also Nollan, 483 U.S. at 837.

In the present matter, Petitioner does not contend, as the Court of Special Appeals of Maryland seemed to believe, that the State's interests in preserving the water quality of the Loch Raven Reservoir, as well as providing

appropriate educational and recreational facilities for the citizens of Northern Baltimore County, are not legitimate and well-intended. This, however, does not end the analysis.

In Dolan, the Court determined the degree to which the exactions demanded by a government must impact on a property owner's proposed development. After an analysis of the various standards applied by jurisdictions across the country, the Dolan Court ultimately held that a "rough proportionality" test must be applied in determining whether the degree of exactions required by government conditions on a landowner bore the required relationship to the projected impact of the proposed development to satisfy the takings clause of the Fifth Amendment. Id. at 2319. This standard, the Court noted, is somewhere between the very generalized statements as to the necessary connection between the required dedication and the proposed development proclaimed by several jurisdictions, and the "specific and uniquely attributable" test applied by others. Id. at 2318. "No precise mathematical calculation is required, but the [governmental entity] must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." Id. at 2319-20 (footnote omitted).

Specifically, the Court held that the findings relied upon by the City of Tigard to require the landowner to dedicate a portion of her property in a flood plain area as public greenway as a condition for constructing a new

commercial building did not show the required reasonable relationship between the flood plain easement and the landowner's proposed new building necessary to satisfy the requirement of the Fifth Amendment "takings" clause. Id. at 2320. The Court held in this manner even though the City found that the paved parking lot that was included in the proposed development would increase storm water flow from property. The City never expressed a reason why a public greenway, as opposed to a private one, was required in the interest of flood control. Id. Moreover, the City failed to meet its burden of demonstrating that the additional number of vehicle and bicycle trips generated by the Petitioner's proposed commercial development were reasonably related to the City's requirement of dedication of a pedestrian/bicycle pathway easement as a condition of granting the Petitioner's requested building permit. Id. at 2321-22. Again, no precise mathematical calculation was required, but the City was required to quantify its findings in support of the dedication for the pedestrian/bicycle pathway in a manner beyond the conclusory statement that it could offset some of the traffic demand generated by the Petitioner's proposed development. Id.

In the present matter, the Respondent did not meet its burden of justifying the required exactions placed on the Property. In fact, since this matter was finally determined by the Circuit Court for Baltimore County when it granted the Respondent's Motion to Dismiss for Failure to State a Claim, the Respondent was

not required to offer even one scintilla of evidence to justify the exactions imposed on the Petitioner. It cannot be held that a governmental entity has met its burden under the "rough proportionality" test when no evidence supporting the exactions required of a property owner was offered by the regulating governmental authority. At a minimum, a preliminary hearing must be held, and consideration of sufficient evidentiary facts must occur prior to a final judgment being entered in this matter.

## IV.

## CONCLUSION

For the reasons set forth above, the Petitioner respectfully requests that this Honorable Court issue a Writ of Certiorari to review the order and opinion of the Court of Special Appeals of Maryland affirming the dismissal of the Petitioner's Complaint in the Circuit Court for Baltimore County, Maryland.

Respectfully submitted,

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December 12, 1995

APPENDIX

COURT OF SPECIAL APPEALS
OF MARYLAND

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No. 929

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SECURITY MANAGEMENT CORP.,

Appellant

v.

BALTIMORE COUNTY, MARYLAND,

Appellee

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Appeal from the Circuit Court for
Baltimore County, Maryland
Maurice W. Baldwin, Jr., Judge
(50/398/93-CV-3916)

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Argued: December 5, 1994

Decided: March 31, 1995

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Before Judges C.J. Wilner,
Davis and Harrell, Court of
Special Appeals of Maryland

| | | |
|---|---|---|
| SECURITY MANAGEMENT CORP. | * | IN THE CIRCUIT |
| | * | COURT FOR |
| Plaintiff | | |
| v. | * | BALTIMORE COUNTY |
| BALTIMORE COUNTY, MARYLAND | * | Case No. 93CV03916 |
| | * | |
| Defendant | | |

* * * * * * * * *

**OPINION AND ORDER**

Plaintiff filed an $80 million suit against Baltimore County alleging that the actions of Baltimore County violate 42 USCA sec. 1983, the Fourteenth Amendment of the United States Constitution, the Fifth Amendment to the United States Constitution as applied to the states through the Fourteenth Amendment, as well as Article 24 of Maryland's Declaration of Rights, and Articles 40 and 40A of the Maryland Constitution. Defendant, Baltimore County, joined by intervenor, People's Counsel for Baltimore County, filed Motions to Dismiss pursuant to Md. Rule 2-322. This Court held its opinion sub curia and has reviewed the pleadings and considered oral arguments presented at the hearing on October 7, 1993.

**BACKGROUND**

Plaintiff applied for a special exception to the Baltimore County Zoning Appeal. This request was denied. In the interim, pending a current rezoning case, this suit was filed.

Plaintiff contends that exhaustion of remedies is not a prerequisite under the

sec. 1983 Civil Rights Act. *Patsy v. Board of Regents*, 457 U.S. 496 (1982). 42 U.S.C.A. sec. 1983, part of the Civil Rights Act of 1871, provides as follows:

> Sec. 1983. Civil action for deprivation of rights. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

This Court recognizes that "[i]t is now clearly established that a plaintiff suing under 42 U.S.C. sec. 1983, either in state or federal court - need not exhaust his administrative remedies prior to bringing his sec. 1983 action." *Essinger v. Baltimore City*, 95 Md. App. 607, 614-15 (1983).

Nevertheless, plaintiff's sec. 1983 claim is premature. Claims involving land use and regulatory takings still must manifest an injury. Plaintiff must both plead and prove an injury unless challenging the constitutionality of the procedures or character of the zoning board itself. See *Williamson Planning Commission v. Hamilton Bank*, 473 U.S. 172, 186 (1985) (taking claim "not ripe until the governmental entity charged with implementing the regulations has reached a final decision regarding the

application of the regulation to the property at issue"); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986) (refusing to reach the merits of a taking claim because the developer had only submitted one application and thus it was unclear whether a new application for a less intensive use would have been approved).

The decision to grant a special exception remains within the discretion of the County Zoning Board and, ultimately, the Board of Appeals. Plaintiff cannot claim entitlement to a special exception under Maryland state law, as contemplated by sec. 1983. *Biser v. Town of Bel Air, Md.*, 778 F. Supp. 249, aff'd, 991 F.2d 100 (1993). "A property interest requires more than a 'unilateral expectation' that a permit or license will be issued; instead there must be a 'legitimate claim of entitlement'." *Id.* at 104, quoting *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

"In applying this standard of entitlement, we have held that if a local agency has any significant discretion whether a permit should issue, then a claimant has no legitimate entitlement and, hence, no cognizable property interest." *Gardner v. Baltimore Mayor & City Council*, 969 F.2d 63, 68 (4th Cir. 1992).

Further, plaintiff does not contend that the RC-4 classification - applicable to the property at issue - does not serve a legitimate public purpose. Nor are there allegations that plaintiff is barred from developing within the

constraints of that particular zoning classification. And, finally, there are no allegations of a constitutionally protected right to attain the zoning one desire - without something more. The nature of any comprehensive zoning plan necessitates concepts of boundaries and distinctions.

The County Council has significant discretion to decide whether an applicant should be permitted to secure a special exception. It is well established that zoning ordinances that merely prohibit the most "beneficial" use of property are valid regulations - which, thus, does not invoke sec. 1983, equal protection nor Fifth Amendment takings.

Takings actions include (1) actual appropriations, (2) physical invasions, as well as valid regulations which result in a denial of all economic value of land. See, e.g., *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922); *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895 (1991); *cert. granted*, 116 L.Ed.2d 455 (1991); *Whitney Benefits v. United States*, 18 Cl. Ct. 394 (1989); *modified*, 20 Cl. Ct. 324 (1990), aff'd 926 F.2d 1169 (Fed. Cir. 1991); *cert. denied*, U.S. 1991). In situations in which there is no physical occupation but potentially decreasing economic value, the Court applies a balancing test. E.g., *Penn Central Transportation Co. v. New York*, 438 U.S. 104 (1978).

Regulations that merely decrease the value of property may not amount to a taking if they leave an economically viable use of the property. In balancing, the Court considers (i) the

social goals promoted, (ii) the diminution in value to the owner, and (iii) the investment-backed expectation of the owner. Thus, *Pennsylvania Coal* suggests that a state statute while substantially promoting public interests could still "so frustrate distinct investment-backed expectations as to amount as to amount to a 'taking'." *Penn Central* stands for the proposition that a "taking" may not occur so long as a "reasonable return" permitted some continued economic viability.

Plaintiff in the instant matter makes much of this third prong. At this juncture there is no way that this Court can make a definite determination. Consideration need be given both to the frustration of investment-backed expectations where a landowner purchases land constrained by zoning and then embarks on attempting changing such zoning and, also to the analysis and determination of the final plan, if any, that is approved by the Board.

The County Council is guided by the protection and promotion of the general public in their review of rezoning applications. Protecting the character of rural residential areas and the valuable watershed are certainly legitimate powers of the County Council. The balancing test must come later. Insofar as this standard is a flexible one, this Court will defer to the decision of the Council unless this Court determines that the final decision is rendered in violation of Md. State Gov't Code Ann., sec. 10-215(g)(3) (1993).

The *Biser* court reasoned that the applicant ". . .had only a unilateral exception that he would receive the special exception. He possessed no legitimate claim of entitlement, and thus no property right cognizable under the due process clause. The fact that Biser believes the Board acted arbitrarily on his application does nothing to change the fact that he was not deprived of any entitlement or right." *Biser* at 104.

While sec. 1983 is supplementary in nature, historically sec. 1983 is a means to override certain kinds of state law, provide a remedy where state law is inadequate, and provide a federal remedy where the state remedy, through adequate in theory, is not available in practice. *Monroe v. Pape*, 365 U.S. 167 (1961). Plaintiff argues that further dealings with the County Council is futile and therefore need not be pursued. This Court disagrees. Certainly property interests are entitled to procedural due process protection, but Plaintiff falls short of pleading the procedural violations of the process which might invoke sec. 1983 review. Instead, plaintiff seeks damages calculated on an all or nothing basis depending on whether the special exceptions is granted or denied.

For similar reasons, this court is unconvinced by plaintiff's equal protection argument. For the reasons stated above, an analysis of disparate treatment by similarly situated parties - without more - must fail.

Accordingly, it is for the above reasons, it is on this date ___ of

February, 1994, that Defendant, Baltimore County, Maryland's Motion to Dismiss is **GRANTED**, the Motion for Protective Orders are **MOOT**, and costs are to be borne by Plaintiff, SECURITY MANAGEMENT CORPORATION.

Date _____

_____
MAURICE W. BALDWIN, JR.
JUDGE, Circuit Court for
Harford County, sitting
assigned to Circuit Court
for Baltimore County

REPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

NO. 929

September Term, 1994

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SECURITY MANAGEMENT CORP.

v.

BALTIMORE COUNTY, MARYLAND, ET AL.

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Wilner, C.J.
Davis,
Harrell

JJ.

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Opinion by Wilner, C.J.

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Filed: March 31, 1995

Appellant is upset that its property, located in the Loch Raven watershed in Baltimore County, is included in the county's RC-4 resource conservation zone and therefore is limited in its development potential. It claims that inclusion of its property in that zone is unconstitutional for a variety of reasons. We find no merit to its assertions and shall therefore affirm the judgment of the Circuit Court for Baltimore County dismissing its complaint.

## THE COUNTY ZONING LAW

Pursuant to the Constitutional and statutory authority vested in it as a chartered county, Baltimore County has enacted laws governing planning and zoning in the county. The county law provides two methods of rezoning: quadrennial comprehensive rezoning and individual reclassification.

Every four years, the existing zoning on all land in the county is reviewed. The process begins with a review of the zoning regulations and maps by the county Planning Board, which makes a preliminary report to the County Council. Any recommended changes in the zoning regulations or maps are included in that report. Through public hearings, interested citizens are then afforded an opportunity to comment on and object to the preliminary recommendations. Following those public hearings, the Planning Board submits to the Council a final report, including proposed zoning regulations and maps. The public then has three months in which to raise issues before the Council; the Planning Board

has another month thereafter to make its comments. Finally, after one or more public hearings, the County Council, by ordinance, adopts regulations and maps. *See*, in general, Baltimore County Code, §§ 26-123 - 26-125.

In addition to this quadrennial comprehensive rezoning, the County Code allows individual landowners to petition the County Board of Appeals for a reclassification of their properties. Baltimore County Code, § 2-356. A reclassification, being in derogation of the legislative determination made in the most recent comprehensive rezoning, is normally dependent upon a showing either that the existing classification was a "mistake" or that there has been a sufficient change in circumstances since the last comprehensive rezoning to warrant the requested reclassification.

In 1976, as part of the comprehensive zoning process, the County Council created four resource conservation zones. In creating those zones, the County Council found, generally, that development in the rural areas of the county had been taking place at an increasing rate and without the framework of a land use plan or other planning components; that, as a result, the development "has formed very undesirable land use patterns," that a significant amount of "urban sprawl" was occurring along highways in the rural areas as tracts immediately fronting along the highways were "lotted off;" and that such development was detrimental in a number of respects, including the loss of "critical watershed areas."

Among the stated purposes of these zones were discouragement of the then-existing land use patterns, creation of a framework for orderly development, provision of "suitable" areas for rural-suburban development, protection of natural and man-made resources from the compromising effects of development, protection of areas desirable for more intensive future development by regulating undesirable forms of interim development, and conservation of land and water resources.

The four resource conservation zone created as part of the county zoning - agricultural (RC-2), deferral of planning and development (RC-3), watershed protection (RC-4), and rural-residential (RC-5) - still exist. The land at issue here is, and since 1976 has been, in the RC-4 zone. The specific purpose of that zone, as set forth in the Baltimore County Zoning Regulations (BCZR § 1A02.1), is to provide for the protection of water supplies of metropolitan Baltimore and neighboring jurisdictions by preventing contamination through unsuitable types or levels of development in their watersheds.

Although there have been amendments to the BCZR governing the RC-4 zone since 1976, the maximum gross density allowed for that zone has remained fixed - 0.2 dwelling units per acre, i.e., one house for every five acres. BCZR § 1A02.4B. As an alternative to that number of dwelling units, however, the zoning regulations provide for certain other uses permitted either by right or by special exception. Included among the uses permitted by right are farms, public

schools, and transit facilities; included among the uses permitted by special exception are antique shops, camps, community buildings, churches, restaurants, and offices.

## THE ISSUES

In 1974, appellant, a Maryland corporation in the business of developing and managing real estate, acquired through stock acquisition and merger a 391-acre tract, of which the 215-acre parcel at issue here was a part. At some point, the other 176 acres were rezoned to DR-3.5 (Density Residential - 3.5 dwelling units per acre) and developed into a residential community known as Hunters Run.

In 1992, during the comprehensive zoning process, appellant submitted to the County Council a petition requesting that the Council rezone the remaining 215 acres from RC-4 to DR-16 (Density Residential - 16 dwelling units per acre) and BL (Business-Local). Under the plan submitted with the petition, appellant proposed to build approximately 3,000 units, including townhouses, multi-family homes, and elderly housing. Under the current RC-4 zoning, apart from the other uses permitted of right or by special exception, appellant would be able to build only 43 dwelling units, which could be clustered.

In its petition, appellant asserted that the community would be phased in over a 15-year period, at the rate of 200 units per year, that it would be an "environmentally sensitive" community meeting all applicable environmental

requirements, that it was in accord with the county master plan, that the public school system was adequate to accommodate children from the proposed community, and that it would actually improve water quality in the area. Notwithstanding these assertions, some of which are conclusory in nature, the Council denied appellant's petition and left the property in the RC-4 zone.

In April, 1993, appellant filed the complaint leading to this appeal, alleging that the Council's refusal to rezone the property in the manner it had requested violated appellant's Federal and State Constitutional rights. Specifically, it urged that it was being denied equal protection and substantive due process in contravention of the Fourteenth Amendment, 42 U.S.C. § 1983, and Md. Decl. of Rts., art. 24, and that retention of the property in the RC-4 zone constituted a "taking" within the meaning, and in violation, of the Fifth and Fourteenth Amendments, 42 U.S.C. § 1983, and art. III, §§ 40 and 40A of the Maryland Constitution. Upon motion by the County and by People's Counsel, who had intervened in the case, the court dismissed the complaint for failure to state a claim on which relief could be granted.

In October, 1993 - prior to entry of the order dismissing the complaint - appellant filed a petition with the Board of Appeals for a reclassification of the property. It then sought, and obtained, a postponement for the asserted purpose of submitting a revised plan. As of the date of oral argument before this Court, in February, 1995, appellant had neither

submitted a revised plan nor requested further consideration by the Board of its initial petition, which is still pending.

## DISCUSSION

### Introduction

As noted, appellant has raised a number of discrete Constitutional issues, which we shall discuss. At oral argument, those arguments essentially coalesced into the assertion that, if a person buys property that he believes will eventually be in the path of development and it later turns out that the property is in the path of development, he has a Constitutional right to have the property rezoned in order that he may develop it as he wishes. That is not the law.

Before addressing the particular Constitutional challenges raised by appellant, we shall consider briefly appellees' argument that they are all premature because appellant has failed to exhaust an available administrative remedy, i.e., consideration of its petition for reclassification, which it deliberately had postponed. Appellant, of course, contends that, under *Patsy v. Board of Regents*, 457 U.S. 496 (1982) and its progeny, it is not required to exhaust administrative remedies when pursuing a claim under 42 U.S.C. § 1983. Appellees rejoin that (1) that doctrine applies to alleged violation of individual, personal rights and not to zoning cases, and (2) in any event, the case is premature under the "ripeness" doctrine.

These are interesting questions, but, as they are not really jurisdictional in nature, we shall pass over them. We believe that there is utterly no merit to the substance of appellant's arguments, and we shall affirm on that basis. For purposes of this appeal, therefore, we shall assume, although we do not hold, that appellant was not required to pursue its petition for reclassification to conclusion before filing this lawsuit.

**Taking Claims**

Appellant makes both a procedural and a substantive complaint with respect to its "taking" claim. First, it avers that, "[except in unusual cases," a court should not dismiss a constitutional claim for a taking of property where the complaint raises "complicated factual issues concerning the Appellant's actions and justifications for denying a zoning reclassification." Naturally, it contends that its complaint in fact raises such complicated issues. Substantively, it argues that the proper test for determining whether State regulation constitutes a "taking" is whether the regulation reasonably advances legitimate State interests or denies an owner "economically viable use of his land." *See Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987).

Keeping in mind that this appeal arises from the granting of a motion to dismiss, rather than a summary judgment or judgment entered after trial, we need to look at, and confine ourselves to, the allegations in the complaint. They are sparse, indeed.

After alleging how and when appellant acquired the property, the fact that it filed a petition for rezoning, and that it "documented" all the nice things it says about the planned community, appellant avers that, "[n]otwithstanding its earlier rezoning and/or permitting of development of rural and/or resource conservation properties adjacent to or in close proximity to The Property and notwithstanding the appropriate and beneficial use to which [appellant] planned to put The Property, The Council . . . denied [appellant's] request to change the zoning . . . from RC-4 to DR-16 and BL." In Counts V and VI, based respectively on the Fifth Amendment and the Maryland Constitution, appellant contends that a taking has resulted "due to the fact that, without proper rezoning, [appellant] has been denied the economically viable use of the Property and has suffered substantial diminution in its investment-backed expectations as owner of such property." The only addition to this explanation is in Count VII, based on the Fourteenth Amendment, where it claims that the County's action was arbitrary and capricious.

Taking these allegations as they are, it is clear that no Constitutional taking has been adequately alleged. Nor have any "complicated factual issues" been alleged sufficient to make a motion to dismiss inappropriate.

We reject as absurd the contention that the creation of an RC-4 zone, as defined in the BCZR, and the inclusion within it of property in an important metropolitan watershed do not substantially advance a legitimate State

interest. The purpose of the zone is set forth in the ordinance creating it; we are aware of no case - and none has been cited to us - holding that the conservation of watersheds and the limitation of development in those watersheds is not a legitimate State interest. Whether, to achieve that purpose and protect that interest, particular land in a watershed should remain free from intensive development is quintessentially a legislative judgment call.

The issue, really, is whether continued inclusion of the property in the low-density zone deprives appellant of a Constitutionally-protected right. In *Baltimore City v. Borinsky*, 239 Md. 611 (1965), the Court adopted a strict and exacting standard in this regard, holding, at 622:

> "If the owner affirmatively demonstrates that the legislative or administrative determination deprives him of all beneficial use of the property, the action will be held unconstitutional. But the restrictions imposed must be such that the property cannot be used for any reasonable purpose. It is not enough for the property owners to show that the zoning action results in substantial loss or hardship."

(Emphasis added).

Appellant urges that, under more recent Supreme Court pronouncements, that is no longer the test. It seizes upon the articulation in *Nollan v. California*

*Coastal Comm'n*, supra, 433 U.S. 825; *Keystone Bituminous Coal Ass'n v. De Benedictis I*, 480 U.S. 470 (1987); *Lucas v. South Carolina Coastal Council*, ___ U.S. ___, 112 S.Ct. 2886 (1992); and *Dolan v. City of Tigard*, ___ U.S. ___, 114 S.Ct. 2309 (1994), that a regulation may constitute a taking if it denies the owner of "economically viable use of his land." At least implicit in its argument is that it is possible for an owner to be denied the economically viable use of his land even though he is not denied "all beneficial use."

The simple and most direct answer to this assertion is that appellants have overlooked the important modifier "all." In *Lucas*, the Supreme Court made clear that the standard was whether the regulation "denies *all* economically beneficial or productive use of land." (Emphasis added). 112 S.Ct. at 2893. The Court later supplied its own emphasis to the word "all" when it stated, at 2895, that an owner suffers a taking when he has been called upon "to sacrifice *all* economically beneficial uses in the name of the common good, that is to leave his property economically idle." In *Waters v. Montgomery County*, 337 Md. 15 (1994), the Court noted that, under *Lucas*, a regulation does not go "too far" unless it "denies *all* economically beneficial or productive use of land." (Emphasis added). *Waters*, supra, at 40, quoting from *Lucas*, 112 S.Ct. at 2893. It then reiterated the *Borinsky* test, confirmed in *Pitsenberger v. Pitsenberger*, 287 Md. 20 (1980) that "[t]o constitute a taking in the constitutional sense. . .the state action must deprive the owner of all beneficial use of the property."

The *Borinsky* articulation is entirely consistent with the Federal standard explained in *Lucas*, and it is clear from the pleading, read in light of the county zoning law, that appellant has not been deprived of all economically beneficial or productive use of its land; inclusion of the property in the RC-4 zone has not left it economically idle. Appellant has therefore not pled a Constitutional taking under either the Maryland or the Federal Constitution.

**Equal Protection**

The sole basis for appellant's equal protection complaint is that the County treated its rezoning request differently from the way it treated similar requests by others. It contends that tracts located in close proximity to its property, which were previously zoned rural or resource conservation, were "rezoned or otherwise permitted to develop."

Because appellant's claim is not based on an "infringement of a fundamental right or discrimination against a suspect class," we review the Council's actions under the rational basis test. *Silver v. Franklin Township Board of Zoning Appeals*, 966 F.2d 1031, 1036 (6th Cir. 1992). The rational basis test requires appellant to prove that (1) the County treated it differently than it treated others similarly situated, and (2) the disparate treatment did not bear a rational relationship to a legitimate interest.

Appellant alleges in paragraph 11 of its complaint, entitled "Facts Common to All," that

> "[t]he tracts of previously rural and/or resource conservation property surrounding The Property or in close proximity to The Property which were rezoned or were otherwise permitted to develop became the tracts upon which Loveton Farms residential development, Loveton Center business development, Broadmead residential development, Hunters Run residential development, North Park business development, Hunt Valley Mall, Hunt Valley Business Center, Shawan business development, Masonic Home of Maryland and Highlands Corporate Office Park were developed and built."

In the substantive portion of its complaint, appellant alleges that the County

> "has treated [appellant's] request to rezone the Property from RC-4 to DR-16 and BL, differently than it treated similar requests by others, and, specifically has permitted those properties identified in paragraph 11, and others, to be developed and/or rezoned from rural and/or resource conservation classifications so as to permit development, but has not permitted similar rezoning or development of The Property."

Nowhere in the complaint does appellant allege with any specificity

that the Council treated it differently than others similarly situated. Although appellant asserts that the Council granted other landowner's request to rezone, it has given no facts tending to show "that these other developments were similarly situated to his development." *Silver*, 966 F.2d at 1036-37. Accordingly, appellant fails to allege an equal protection claim.

Even if we assume that the first prong of the rational basis test has been satisfied, appellant has failed to show that any disparate treatment did not bear a rational relationship to a legitimate interest.

Appellant has not shown, even in its pleading, that the RC-4 zoning lacks a legitimate public purpose or that the means under the RC-4 zoning regulations are unsuitable to that purpose. Appellant merely argues that the Council has rezoned nearby land and that the Council's failure to rezone its property is a violation of its rights to equal protection.[1] That argument is completely without merit.

The very nature of the zoning process requires that parcels of land - even neighboring land - be considered individually. Although neighboring parcels may share some characteristics, each parcel is unique and may not share

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[1] Although appellant mentions in its complaint that one of the neighboring properties that was rezoned includes Hunters Run, it fails to mention that that is the other portion of the 391-acre tract known as Towson Nurseries.

all of the relevant characteristics possessed by adjacent or nearby parcels. If we were to adopt appellant's argument that its rights to equal protection have been violated simply because neighboring land has been zoned differently from its land, we would be doing away with the zoning process altogether.

During the quadrennial comprehensive zoning process, the County reviews the current zoning structure, evaluates the changes in the community and environment, and makes any necessary amendments it deems appropriate. "Lines. . .must be drawn somewhere." *N.W. Merchants Term v. O'Rourke*, 191 Md. 171, 187 (1947). Without any allegations that the zoning lacks a legitimate purpose, appellant's claim fails.

**Substantive Due Process**

Appellant argues that the refusal to rezone its property was arbitrary and capricious and that it was therefore denied its right to substantive due process.

Appellees argue that appellant failed to state a claim for substantive due process because it failed to show a property interest that is cognizable under the 14th Amendment's Due Process Clause. We agree.

In *Gardner v. Baltimore Mayor & City Council*, 969 F.2d 63 (4th Cir. 1992), the City Planning Commission and City Department of Public Works delayed approval of a public works agreement which would have allowed Gardner to construct a residential subdivision on

its property. As a result of the delays, Gardner lost title to the property in a foreclosure sale and thereafter filed a complaint alleging denial of substantive due process. The Court held that

> "[t]he first step in analyzing whether the city deprived appellants of substantive due process is a determination of whether they possessed a property interest in the public works agreement that is cognizable under the Fourteenth Amendment's Due Process Clause. . . .If there is no cognizable property interest, there is no need to reach the question of whether a purported deprivation was arbitrary or capricious."

*Id.* at 68.

In *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), the Supreme Court held that "[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." In applying the "claim of entitlement" standard to substantive due process claims, the *Gardner* Court held:

> "whether a property-holder possesses a legitimate claim of entitlement to a permit or approval turns on whether, under state and municipal law, the local agency lacks *all* discretion to deny issuance of the permit or to withhold its approval. Any significant discretion conferred

> upon the local agency defeats the claim of a property interest."

*Gardner*, 969 F.2d at 68.

The Court further instructed that "[u]nder this standard, a cognizable property interest exists 'only when the discretion of the issuing agency is so narrowly circumscribed that approval of a proper application is virtually assured.'" *Id.* (quoting *RRI Realty Corp. v. Incorporated Village of Southampton*, 870 F.2d 911, 918 (2d Cir. 1989).

Applying the standard, *Gardner* held that, based on the authority granted to the Commission by the city's *Subdivision Regulations*, the "Commission [had] significant discretion to reject even properly submitted applications." *Gardner*, 969 F.2d at 69. The Court concluded, holding that

> "Baltimore's subdivision regulations vest broad discretion with the Planning Commission at virtually every stage of the process. This fact by itself deprives appellants of any legitimate claim of entitlement to the regulatory approvals sought. Because they did not possess any property interest cognizable by the Fourteenth Amendment's Due Process Clause, their § 1983 action was properly dismissed."

*Id.* at 72.

In another recently decided Fourth Circuit case, *Biser v. Town of Bel Air*, 991 F.2d 100 (4th Cir.), *cert. denied*,

___ U.S. ___, 114 S.Ct. 182 (1993), the appellant claimed that the Town of Bel Air deprived him of substantive due process by refusing to grant him a 'special exception' that would have permitted him to build commercial buildings on property zoned for residential use only. The Court held that

> "In order for Biser to state a substantive due process claim, he must first demonstrate that he possesses a 'cognizable property interest, rooted in state law,'. . . We do not believe that Biser held a property interest in the special exception before it was granted by the Board. A property interest requires more than a 'unilateral expectation' that a permit or license will be issued; instead, there must be a 'legitimate claim of entitlement.'. . .In applying this standard of entitlement, we have held that if a local agency has 'any significant discretion' in determining whether a permit should issue, then a claimant has no legitimate entitlement and, hence no cognizable property interest."

*Id.* at 103-4 (citations omitted). Applying that standard, the Court held that the Board had "significant discretion in deciding whether to grant. . .a special exception. In making its decision, the Board [uses its discretion to] determine whether granting the exception 'would adversely affect the public health, safety, security, morals or general welfare.'" *Id.* at 104 (citation omitted).

Appellant does not deny that, in order to allege a violation of substantive due process, it first must allege a property interest that is cognizable under the 14th Amendment. It contends that it has met that burden. Appellant argues that "the discretion of the local agency in this case, i.e., the County Council, is circumscribed by the requirement that it support its decisions with probative evidence, as well as the requirement to consider the County as a whole, and not act in favor of a plebiscite of citizens who are acting in their own benefit." Appellant's attempt to strip the Council of its discretion is unconvincing.

Appellant has no Constitutionally cognizable interest in obtaining DR-16 and BL zoning. At best, it has merely a unilateral expectation or desire to obtain the requested zoning. Whether that zoning is to be granted is strictly within the discretion of the County Council.

In making its determination the Council must decide whether granting the petition would promote the general purpose and intent behind the establishment of the zoning regulations. *Baltimore County Code*, § 26-116. To that end, the Council must determine whether granting the petition would "reduce congestion in the roads, streets, and alleys. . .promote adequate light and air. . .promote health and the general welfare. . .[and] facilitate adequate provision[s] for schools, parks, water, sewerage, transportation, and other public requirements, conveniences, and

improvements." *Id.* As the Court held in *Biser*, "It is difficult to image a more flexible standard." *Biser*, 991 F.2d 100, 104. "Moreover, the standard focuses on the amount of discretion accorded the issuing agency by law, not on whether or o what degree that discretion is actually exercised." *Gardner*, 969 F.2d at 68. Thus, appellant's contention that it submitted an "award winning" proposal that met the conditions of the master plan is irrelevant to the substantive due process analysis.

Even if we assume that appellant has established a property interest that is cognizable under the 14th Amendment's Due Process Clause, the result is unchanged.

> "Zoning is a legislative function, and when reviewing the acts of zoning authorities, the duty of the courts is to decide whether such action was arbitrary, discriminatory or illegal [citations omitted]. . . .When a comprehensive map designed to cover a substantial area is adopted, it is entitled to the same presumption of correctness as an original zoning."

*JMC Constr. v. Montgomery County*, 54 Md. App. 1, 16 (1983); ***see also*** *Ark Readi-Mix Concrete Corp. v. Smith*, 251 Md. 1 (1968); *County Council v. Offen*, 334 Md. 499, 507 (1994). Additionally, in *Stump v. Grand Lodge*, 45 Md. App. 263, 269 (1980), we noted:

> "Comprehensive rezoning is a vital legislative function, and in making zoning decisions during the comprehensive rezoning process, a

> County Council is exercising what has been described as its 'plenary' legislative power. The power is broad and is limited only by the constitutional restriction that the Council's actions 'bears a substantial relationship to the public health, comfort, order, safety, convenience, morals and general welfare. . .' [citations omitted]."

Clearly, prohibiting dense residential development near the Loch Raven Reservoir is substantially related to the protection of the watershed. Additionally, restricting the growth of the community and the manner in which it develops is causally connected to the health, safety, crime prevention, congestion avoidance and general welfare of the community. Accordingly, we affirm the trial court's decision in its entirety.

JUDGMENT AFFIRMED;
COSTS TO BE PAID BY APPELLANT.

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|---|---|---|
| SECURITY MANAGEMENT CORP.<br>9901 Langs Road<br>Baltimore, MD 21220 | * | IN THE |
| Plaintiff | * | CIRCUIT COURT |
| v. | * | |
| BALTIMORE COUNTY, MARYLAND<br>Serve On:<br>Mr. H. Emslie Parks<br>County Attorneys Office, Office of Law<br>400 Washington Ave.<br>Towson, MD 21204 | * | FOR<br>BALTIMORE COUNTY |
| Defendant. | * | CASE NO. |

* * * * * * * * *

**COMPLAINT**

Security Management Corp., Plaintiff, by Thomas C. Beach, III and Christopher S. Lambert, and Whiteford, Taylor & Preston, its attorneys, sues Baltimore County, Maryland, Defendant.

**FACTS COMMON TO ALL COUNTS**

1. Security Management Corp., Plaintiff, (hereinafter "Security") owns a 215 acre parcel of property (hereinafter "The Property") located in Baltimore County, Maryland (hereinafter "The County") which extends east of York Road, south of Loveton Center, Loveton Farms and Phoenix Road, north of the Broadmead Property and west of the Loch Raven Reservoir, near Hunt Valley, Maryland.

dd

2. The Property is a portion of a three hundred ninety-one (391) acre tract known as the "Towson Nursey Parcel."

3. In April of 1973 the "Towson Nursey Parcel" was owned by Towson Nurseries Inc., a Maryland Corporation formed in the 1920's as an investment.

4. In April of 1973, Security owned in excess of eighty percent (80%) of the issued and outstanding shares of a publically-traded company known as Universal Housing and Development Company (hereinafter "Universal"),a Massachusetts business trust which was qualified to do business in Maryland as a foreign corporation.

5. On April 6, 1973, Universal began acquiring shares of Towson Nurseries, Inc.

6. By January 9, 1974 Universal owned one hundred percent (100%) of Towson Nurseries, Inc.

7. In May of 1979 Towson Nurseries, Inc. was dissolved at which time title to the "Towson Nursery Parcel" vested in the sole stockholder, Universal.

8. Subsequent to the dissolution of Towson Nurseries, Inc. Universal was completely merged into Security which, by that time, had acquired all of the issued and outstanding shares of Universal.

9. Security is, and at all times relevant to this suit was, incorporated under the laws of the State of Maryland and engaged in the business of

development and management of real estate.

10. Prior to 1992 the Baltimore County Council (hereinafter "The Council") rezoned large tracts of previously rural or resource conservation property surrounding The Property or in close proximity to The Property and/or undertook other actions so as to permit industrial and residential development of those tracts.

11. The tracts of previously rural and/or resource conservation property surrounding The Property or in close proximity to The Property which were rezoned or were otherwise permitted to develop became the tracts upon which Loveton Farms residential development, Loveton Center business development, Broadmead residential development, Hunters Run residential development, North Park business development, Hunt Valley Mall, Hunt Valley Business Center, Shawan business development, Masonic Home of Maryland and Highlands Corporate Office Park were developed and built.

12. In 1992, in accordance with the procedure of the Council, Security submitted a Petition (hereinafter referred to as "The Petition") to the Council requesting that the Council rezone The Property from RC-4 (Resource Conservation Watershed Protection Area) to DR-16 (Density Residential Zoning) and BL (Business - Local).

13. In support of its Petition Security submitted plans to the Council to develop the Property as a planned community (known as "Colvista") consisting of

approximately three thousand (3,000) units including townhouses, multi-family homes, elderly housing and a retail support component.

14. In support of its Petition Security documented the following facts:

a. That Colvista would be constructed in phases over a fifteen year period at a rate of 200 homes per year;

b. That Colvista would be an environmentally sensitive community that meets all State, County and Federal requirements regarding wetlands, floodplains, steep slopes, erodible soils, and forestation;

c. That the County already has water and sewer service adequate to meet the needs of Colvista. Indeed sewerage planning in the late 60's envisioned higher sewer and water demands for this area than the current zoning;

d. That Colvista is in accord with the Master Plan adopted by The Council;

e. That Colvista would fill a documented and substantial need for housing in the Hunt Valley/Timonium area;

f. That the County's school system will possess more than enough capacity to accommodate children from Colvista; and

g. That Colvista will actually improve water quality in the area and will reduce pollutant loadings to the Loch Raven Reservoir.

15. Notwithstanding its earlier rezoning and/or permitting of development of rural and/or resource conservation properties adjacent to or in close proximity to The Property and notwithstanding the appropriate and beneficial use to which Security planned to put The Property, The Council, on October 15, 1992, denied Plaintiff's request to change the zoning of the Colvista Property from RC-4 to DR-16 and BL.

**Count I**
**(Equal Protection - Federal)**

16. The County, in violation of the Fourteenth Amendment to the United States Constitution and 42 U.S.C.A. 1983, has treated Security and Security's request to rezone the Property from RC-4 to DR-16 and BL, differently than it treated similar requests by others, and, specifically, has permitted those properties identified in paragraph 11, and others, to be developed and/or rezoned from rural and/or resource conservation classifications so as to permit development, but has not permitted similar rezoning or development of The Property.

17. The actions of the County, by and through The Council and others, have resulted in violations of the Plaintiff's equal protection rights under the Fourteenth Amendment of the United States Constitution.

18. The actions of Baltimore County, by and through The Council and others, have resulted in the denial of Plaintiff's equal protection rights by denying

Plaintiff a cognizable property right in a discriminatory manner which does not bear any relation to a legitimate state interest.

WHEREFORE, this suit is brought and the Plaintiff requests that this Court order the Baltimore County Council to rezone The Property to D-16 and BL, award Security damages in the amount of Ten Million Dollars ($10,000,000.00), and award other appropriate equitable relief.

**Count II**
**(Equal Protection - State)**

19. The Plaintiff does hereby adopt and incorporate herein by reference the allegations contained in paragraphs 1 through 15 hereinabove as though the same were more fully set forth herein and made a part hereof.

20. The County, in violation of Article 24 of Maryland's Declaration of Rights, has treated Security and Security's request to rezone the Property from RC-4 to DR-16 and BL, differently than it treated similar requests by others, and, specifically has permitted those properties identified in paragraph 11, and others, to be developed and/or rezoned from rural and/or resource conservation classifications so as to permit development, but has not permitted similar rezoning or development of The Property.

21. The actions of the Baltimore County, by and through The Council and others, have resulted in violations of the

Plaintiff's rights under Article 24 of Maryland's Declaration of Rights.

22. The action of the Baltimore County, by and through The Council and others, have resulted in the denial of Plaintiff's equal protection rights by denying Plaintiff a cognizable property right in a discriminatory manner which does not bear any relation to a legitimate state interest.

WHEREFORE, this suit is brought and the Plaintiff requests that this Court order the Baltimore County Council to rezone The Property to D-16 and BL, award Security damages in the amount of Ten Million Dollars ($10,000,000.00), and award other appropriate equitable relief.

**Count III**
**(Substantive Due Process - Federal)**

23. The Plaintiff does hereby adopt and incorporate herein by reference the allegations contained in paragraphs 1 through 15 hereinabove as though the same were more fully set forth herein and made a part hereof.

24. The County's refusal to rezone The Property was not based upon the facts relevant to the impact of Colvista upon the economy or environment of Baltimore County, but, rather, upon improper political motivations and personal bias.

25. The County's refusal to rezone The Property constitututes an improper, arbitrary and capricious exercise of governmental power and does not bear a

substantial relationship to any legitimate governmental interest.

26. The County's refusal to rezone The Property constitutes a violation of the Fourteenth Amendment to the United States Constitution and 42 U.S.C.A. 1983.

27. The actions of The County, by and through The Council and others, have resulted in the denial of Plaintiff's substantive due process rights.

WHEREFORE, this suit is brought and the Plaintiff requests that this Court order the Baltimore County Council to rezone The Property to D-16 and BL, award Security damages in the amount of Ten Million Dollars ($10,000,000.00), and award other appropriate equitable relief.

**Count IV**
**(Substantive Due Process - State)**

28. The Plaintiff does hereby adopt and incorporate herein by reference the allegations contained in paragraphs 1 through 15 hereinabove as though the same were more fully set forth herein and made a part hereof.

29. The County's refusal to rezone The Property was not based upon the facts relevant to the impact of Colvista upon the economy or environment of Baltimore County, but, rather, upon improper political motivations and personal bias.

30. The County's refusal to rezone the Property constitutes an improper, arbitrary and capricious exercise of governmental power and does not bear a

substantial relationship to any legitimate governmental interest.

31. The County's refusal to rezone the Property constitutes a violation of Article 24 of Maryland's Declaration of Rights.

32. The actions of The County, by and through The Council and others, have resulted in the denial of Plaintiff's substantive due process rights.

WHEREFORE, this suit is brought and the Plaintiff requests that this Court order the Baltimore County Council to rezone The Property to D-16 and BL, award Security damages in the amount of Ten Million Dollars ($10,000,000.00), and award other appropriate equitable relief.

**Count V**
**(Taking Fifth Amendment)**

33. The Plaintiff does hereby adopt and incorporate herein by reference the allegations contained in paragraphs 1 through 15 hereinabove as though the same were more fully set forth herein and made a part hereof.

34. The actions of The County, by and through The Baltimore County Council and others, have caused the Plaintiff to suffer a "taking" pursuant to the Fifth Amendment to the United States Constitution as applied to the State of Maryland by the Fourteenth Amendment to the United States Constitution and 42 U.S.C.A. 1983.

35. A "taking" of Plaintiff's land has resulted due to the fact that, without the proper rezoning, Plaintiff has been denied the economically viable use of the Property and has suffered substantial diminution in its investment-backed expectations as owner of such Property.

WHEREFORE, this suit is brought and the Plaintiff claims as compensatory damages the sum of Ten Million Dollars ($10,000,000.00) and other appropriate relief.

**Count VI**
**(Taking - Article 40 and 40A)**

36. The Plaintiff does hereby adopt and incorporate herein by reference the factual allegations contained in paragraphs 1 through 15 hereinabove as though the same were fully restated herein.

37. The actions of The County, by and through The Council and others, have caused the Plaintiff to suffer a "taking" under Articles 40 and 40A of the Maryland Constitution.

38. A "taking" of Plaintiff's Property has resulted due to the fact that, without the proper rezoning, Plaintiff has been denied the economically viable use of the Property and has suffered substantial diminution in its investment-backed expectations as owner of such Property.

WHEREFORE, this suit is brought and the Plaintiff claims as compensatory damages the sum of Ten Million Dollars

($10,000,000.00) and other appropriate relief.

**Count VII**
**(Taking - Fourteenth Amendment - United States Constitution)**

39. The Plaintiff does hereby adopt and incorporate herein by reference the factual allegations contained in paragraphs 1 through 15 hereinabove as though the same were fully restated herein.

40. The actions of The County, by and through The Council and others, have caused the Plaintiff to suffer a "taking" in violation of the Fourteenth Amendment to the United States Constitution and 42 U.S.C.A. 1983.

41. The County's refusal, by and through the actions of The Council and others, to rezone The Property, was an arbitrary and capricious application of the powers possessed by the Defendant.

42. The action of the County, by and through the Council, and others in failing to rezone The Property has denied the Plaintiff the economically viable use of the Property and has caused the Plaintiff to suffer substantial diminution in its investment-backed expectations as owner of such Property and, therefore, such action constitutes a "taking" within the meaning of the Fourteenth Amendment to the Constitution of the United States and 42 U.S.C.A. 1983.

WHEREFORE, this suit is brought and the Plaintiff requests that this Court order the Baltimore County Council to rezone The Property to D-16 and BL, award Security damages in the amount of Ten Million Dollars ($10,000,000.00), and award other appropriate equitable relief.

**Count VIII**
**(Taking - Article 24 - Maryland Declaration of Rights)**

43. The Plaintiff does hereby adopt and incorporate herein by reference the factual allegations contained in paragraphs 1 through 15 hereinabove as though the same were fully restated herein.

44. The actions of The County, by and through The Council and others, have caused the Plaintiff to suffer a "taking" in violation of Article 24 of the Declaration of Rights of the Maryland Constitution.

45. A "taking" of Plaintiff's Property has resulted due to the fact that, without the proper rezoning, Plaintiff has been denied the economically viable use of the Property and has suffered substantial diminution in its investment-backed expectations as owner of such Property.

WHEREFORE, this suit is brought and the Plaintiff requests that this Court order the Baltimore County Council to rezone The Property to D-16 and BL, award Security damages in the amount of Ten

Million Dollars ($10,000,000.00), and award other appropriate equitable relief.

Respectfully submitted,

_____

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| | | |
|---|---|---|
| SECURITY MANAGEMENT CORP. | * | In the |
| | * | Court of Appeals |
| v. | * | of Maryland |
| BALTIMORE COUNTY, MARYLAND | * | Petition Docket No. 180, Sept. Term 1995 (No. 929, Sept. Term 1994, Court of Special Appeals) |

**O R D E R**

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals, and the answers filed thereto in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ ROBERT C. MURPHY
Chief Judge

Date: September 13, 1995

Supreme Court, U.S.
FILED
JAN 19 1996
CLERK

No. 95-923

IN THE
# SUPREME COURT OF THE UNITED STATES

October Term, 1995

SECURITY MANAGEMENT CORP.,
*PETITIONER,*

V.

BALTIMORE COUNTY, MARYLAND, *ET AL,*
*RESPONDENTS.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND**

## RESPONDENTS' BRIEF IN OPPOSITION

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20 pp

## QUESTION PRESENTED

Does a County Council's discretionary decision to reject a rezoning request seeking the highest density development possible for a property adjacent to the primary watershed for a metropolitan area, when reasonable, less drastic residential development and other uses may occur under long-standing zoning, violate the Takings Clause of the Fifth Amendment of the United States Constitution?

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IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1995

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No. 95-923

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SECURITY MANAGEMENT CORP.,
PETITIONER,

V.

BALTIMORE COUNTY, MARYLAND, *ET AL.*,
RESPONDENTS.

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## BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI

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Baltimore County, Maryland (the "County") and the People's Counsel of Baltimore County respectfully request that this Court deny the Petition for Writ of Certiorari (Petition) of Security Management Corp. ("Security") seeking review of the decision of the Court of Special Appeals of Maryland. That decision is consistent with the decisions of this Court and other state courts. The Petition fails to allege the existence of any conflict among lower court decisions nor does it fairly present the material facts concerning this case. No compelling justification has been proffered which would warrant the consideration of this limited impact case by this Court.

## STATEMENT OF THE CASE

The County submits the following Statement of the Case to supplement that presented by Security and to clarify several inaccuracies and/or omissions. It is significant that the Complaint filed by Security (Petition, dd-pp), fails to reveal several "facts" Security has included in its Statement of the Case. Therefore, bearing in mind this case was disposed of at the trial level on a Motion to Dismiss where all well-pled facts would have been considered accurate pursuant to *Baker, Watts & Co. v. Miles & Stockbridge*, 95 Md. App. 145 (1993), the consideration of the Petition must be confined to the facts as well-pled below and considered by the lower court.

Initially, it must be understood that the 215 acre parcel, which is the subject of this case, did not stand alone, but is the remainder of a larger 391 acre tract known as the "Towson Nursery parcel" which was also controlled by Security and which has been developed under higher density zoning regulation. *See* paragraph 2 of Complaint (Petition, ee). This remainder of the original 391 acre tract would seem to be included under what was referred to as "other adjacent landowners,"(Petition, p. 3) and this developed property and the other adjacent properties referenced are all located further away from the protected watershed.

Security has designated the subject locale of its proposed development as "Hunt Valley." This is somewhat misleading and, in the context of this case, significant as this developer attempts to ignore the most important geographical

aspect of this case, as stated in the first sentence of the opinion of the Court of Special Appeals of Maryland: ". . .Appellant is upset that its property, located in the Loch Raven watershed in Baltimore County is included in the county's RC-4 resource conservation zone. . . "(Petition, j). The Complaint is more accurate in this regard, in that it refers to the property as "west of the Loch Raven Reservoir, near Hunt Valley, Maryland."(Petition, dd). The Maryland appellate court discussed the seemingly obvious importance of conserving watersheds and limiting development in those areas as a legitimate legislative judgment call. (Petition, r).

Further, as conceded by counsel in oral argument before the Court of Special Appeals of Maryland, and despite the assertion in the Statement of the Case, Security did not allege in its Complaint the nature of the zoning for the subject parcel prior to the RC-4 designation in 1976. Therefore, when the trial court dismissed this claim, it did not have before it any allegation as to the nature of the pre-1976 zoning. Paragraphs 7 and 8 of the Complaint (Petition, ee) seemed to indicate that Security did not acquire the subject parcel until sometime during or after 1979. The operative date for any alleged restrictive zoning is 1976.

Security also states that the property was originally purchased because it was "zoned to accommodate such a [high density] residential subdivision" (Petition, p. 2). Absolutely no such allegation was presented in the Complaint. As the Maryland intermediate appellate court observed, ". . .we need

to look at, and confine ourselves to, the allegations in the complaint. They are sparse, indeed." (Petition, p).

Security unfortunately has gone far outside the record of this case and made bald assertions in this court which are totally unsupported, such as: 1) the property was originally purchased because it was zoned to accommodate a residential subdivision, 2) other adjoining landowners began development of their properties in approximately 1974, 3) all other adjacent landowners purchased their property for residential and commercial development, 4) all adjacent landowners were granted high-density zoning and were permitted to develop (this is inconsistent with the "otherwise permitted" allegation of paragraph 11 of the Complaint, Petition, ff) and 6) other adjacent landowners developed in accordance with their original investment-expectation. The record, of course, is devoid of any allegations concerning other landowners' "expectations."

The conclusory allegations of the Petitioner regarding the virtues of its proposed high-density development project were included in the Complaint, but Security now concedes that even under the present long-established zoning, it could build premium dwelling units at a rate of .2 units per acre. Also, with special exception, Security could build shops, camps, restaurants, offices and churches. (Petition, m). Stated more accurately, the entire 215 acre parcel may be developed presently and several possibilities are available to Security,

including, but not limited to, the option of pursuing cluster development as stated in the Petition.

## REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

### A. IN A "REGULATORY TAKING" CASE, BECAUSE OF THE PETITIONER'S CONTINUED ABILITY TO DEVELOP AND USE ITS HOLDINGS, THERE IS NO DEPRIVATION OF ALL OF ITS PROPERTY; THEREFORE, NO TAKING.

Security incorrectly asserts on page 10 of its Petition that this Court, for the first time in *Lucas v. South Carolina*, ___ U.S. ___, 112 S. Ct. 2886 (1992), used the term "all" in conjunction with the standard test for determining whether a regulation went "too far" in a Fifth Amendment takings context. Security is apparently unaware of this Court's use of the term "all" in the discussion of constitutional taking claims dating from, at least, *United States v. General Motors Corp.*, 323 U.S. 373 (1945), a physical taking claim.

*General Motors*, *supra*, dealt with the United States' taking temporary occupancy of a building under eminent domain. In that case, decided 47 years prior to *Lucas*, the Court found that a governmental action, short of acquisition of title or occupancy, but which deprives the owner of *all* or most of his interest in the subject matter, amounts to a taking within the meaning of the Fifth Amendment. *Id.*, 323 U.S. at 378. Obviously, Security is profoundly mistaken if it believes

this Court has not required all or most of the interests in a property to be destroyed before a constitutional taking claim is cognizable.

Shortly after *General Motors*, this Court decided *United States v. Causby*, 328 U.S. 256 (1946), which dealt with a taking claim involving low-flying government aircraft. Once again, in discussing whether compensation may be obtained under the Fifth Amendment for a "taking," the Court held that "If, by reason of the frequency and altitude of the flights, respondents could not use this land *for any purpose, their loss would be complete*" and in those circumstances, there would be a taking. *Id.*, at 261. However, this Court reversed a Court of Claims determination that a "taking" had, in fact, occurred. The terms "any purpose" and "complete' are synonymous with the "all" of *General Motors*.

*General Motors* and *Causby* were physical taking cases. In the field of regulatory takings, this Court has required total deprivation of all reasonable or economically viable use of the property. Indeed, *Agins v. Tiburon*, 447 U.S. 255 (1980), presented a factual and procedural scenario striking in similarity to this case.

The City of Tiburon adopted ordinances which placed Agins' land in a residential planned development and open space zone, which permitted the building of between one and five single-family residences on a five acre parcel. *Id.*, at 257. Unlike the facts alleged by Security, the Agins unequivocally had acquired their property prior to the adoption of the

zoning ordinance. The *Agins*' Court, in upholding the Supreme Court of California, flatly denied the landowner's claim of a taking without just compensation in violation of the Fifth Amendment. *Id.*, at 259.

Significantly, despite the contentions found in Security's third argument (Petition, pp. 16-20), this Court upheld the California appellate court's sustaining of a demurrer. The California practice, as discussed in *Agins*, in reviewing the grant of a general demurrer and dismissal of a complaint is parallel to Maryland's standard in reviewing the granting of a motion to dismiss as occurred in this case. The terms of the ordinance in Tiburon permitted the development of up to five residences on the Agins' five-acre tract. Although the ordinances limited development, they did not deny the owner economically viable use of his land and, therefore, the landowner's contention that "the city had completely destroyed the value of his property" was rejected and the finding that the complaint failed to state a cause of action was upheld. *Id.*, at 259 n.6.

The Court of Special Appeals of Maryland rejected Security's contention in paragraph 35 of its Complaint that it was denied the economically viable use of the property (Petition, mm) just as the California appellate court rejected a similar contention by Agins. In both cases, the complained of zoning ordinances permitted development but simply not the extremely high-density development demanded by both petitioners.

In *Lucas, supra*, this Court maintained the "all economically beneficial use" standard, while noting that perhaps a denial of 95% of the use, or almost 100%, may in *some* cases, qualify as a taking. *Id.*, 112 S. Ct. at 2895, n.8. This case does not even approach the standard dictated by *Lucas*.

As Security has conceded that it may develop the subject property with up to 43 dwelling units, and as the lower court determined that other additional uses may be permitted by variance and special exception, this claim, on its face, like that in *Agins*, cannot rise to the level of a Fifth Amendment taking. All, or nearly all, use of a property must be destroyed by regulation before a taking claim can survive.

In any event, a zoning district with a .2 unit per acre density standard, together with many other enumerated permitted uses, is clearly valid. The relevant zoning classification, Baltimore County Zoning Regulation 1A03.1 to 1A03.4 is included as an appendix hereto.

**B. THE DECISION BELOW IS CONSISTENT WITH *NOLLAN, DOLAN, LUCAS* AND DECISIONS OF OTHER COURTS.**

Security is apparently suggesting that the use of the term "all" in *Lucas* was gratuitous by Justice Scalia and did not truly reflect the appropriate standard in Fifth Amendment taking cases. However, not only has this Court referred to "all" or "destruction" of all economic use of property in the distant past as in *General Motors* and *Causby*, it has continued to apply

this standard in the most recent cases such as *Dolan v. City of Tigard*, ___ U.S. ___, 114 S. Ct. 2309 (1994). In *Dolan*, this Court cited *Agins, supra*, and stated that a land use regulation does not affect a taking ". . .if it does not deny an owner an economically viable use of his land." 114 S. Ct. at ____. Further clarifying this language in footnote six, the Court stated that permit conditions would not deprive the petitioner of "economically beneficial use," as the landowner would be able to derive *some* economic use for her property. *Id.*, 114 S. Ct. 2316 n.6. (emphasis in original). Obviously, "some" remaining economic use indicates that "all" has not been taken and thus, the *Lucas* standard, which was derived from decisions such as *Agins, supra*, applied to defeat the petitioner's claim.

Contrary to Security's suggestion, for a governmental action, whether it be through direct action or regulation, to effectuate a taking under the Fifth Amendment, such action must deny a landowner of all or most of his interest in the subject matter. This is the law and has been the law for decades.

What makes this case far less compelling than the authority cited by Security is that the factual scenario herein does not involve any exactions, the imposition of specific conditions for a permit (as in *Nollan v. California Costal Comm'n*, 483 U.S. 825 (1987) and *Dolan*) or the total removal of development rights (as in *Lucas*), but concerns the denial of a developer's request to an elected political body to exercise its discretion to change broad land use regulations which have

existed, at a minimum, for 20 years. This is *not* a case where the County attempted to impose heinous conditions in return for building permits or decreed measures which would destroy investment-backed development expectations at the eleventh hour. Put another way, Security is not in the position of defending itself against the imposition of new and unreasonable requirements, but instead is attempting to use the Takings Clause of the Constitution as a sword to achieve "up zoning" rather than protect against "down zoning."

Moreover, the majority in *Dolan* went out of its way to emphasize that the decision was not to affect the legitimacy of traditional comprehensive zoning ordinances. Clearly, the establishment of a zoning district for watershed protection is a proper exercise of the County's police power. There is no dispute that this involves a legitimate public purpose, and that the means are reasonably related to the purpose.

From the beginning of this Court's review of the power of government in the field of zoning regulations, in *Euclid v. Ambler Co.*, 272 U.S. 365 (1926), it has been established that zoning laws are facially constitutional despite alleged diminution in value of landowner's property. The use of the County's police power to protect its residents, by zoning regulation, from the effects of high density development, particularly in a situation where the property is so close to a watershed, has been recognized as legitimate. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

The County adopts the rationale of the Court of Special Appeals of Maryland as found in the Petition, pages r-t in this regard. The County submits that not only did the court below fully consider and correctly decide the takings claim and that prior decisions of this Court, cited *supra*, are controlling, but it is also significant that no conflict in interpretation is alleged by Security. In fact, several state courts have construed *Lucas*, *Nollan* and *Dolan*, and then "all or substantially all" standard, exactly as the lower court below.

*Taylor v. Village of North Palm Beach*, 659 So. 2d 1167 (Fla. App. 4th Dist. 1995); *Long Cove Club v. Hilton Head Island*, 458 S.E.2d 757 (S.C. 1995); *Peterman v. State Dept. of Natural Resources*, 521 N.W.2d 499 (Mich. 1994); *Hensler v. City of Glendale*, 876 P.2d 1043 (Cal. 1994); *S.E. Cass Water Res. v. Burlington*, 527 N.W.2d 884 (N.D. 1995); *Reale Investment v. City of Colorado Springs*, 856 P.2d 91 (Colo. 1993).

The consistency with which the lower courts have followed the "all or substantially all" precedents of this Court further justifies the denial of Security's Petition. Indeed, the decision below turns upon its own facts and security's sparsely worded Complaint, and any further review would only affect and possibly benefit the single investment entity seeking the issuance of the writ.

The "all or substantially all" standard for Fifth Amendment takings represents settled law in this area. This Court has been consistent in its application. Moreover, there is

no suggestion that the lower courts have been anything but consistent in applying the proper standard.

The third argument presented by Security (Petition, pp. 16-20) urging the granting of the writ is so disingenuous that it should be summarily rejected. This argument highlights Security's total misunderstanding of takings jurisprudence.

Petitioner suggests that the "rough proportionality" test set forth in *Dolan*, *supra*, would apply to this case, and the County would be required to show a reasonable relationship between the government's admitted legitimate interests and the complained of zoning. This is simply incorrect. Perhaps Security missed footnote 8 of that opinion. *Id.*, 114 S. Ct. at 2320 n.8. There, Chief Justice Rehnquist concurred with Justice Stevens' dissent stating that in evaluating most generally applicable zoning regulations, the burden properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights. Under *Dolan*, the County does not shoulder the burden of justifying its comprehensive zoning ordinance.

The burden shifted to the local government in *Dolan*, per Chief Justice Rehnquist, because the city made an adjudicative decision on a building permit application for an individual parcel. *Id.*, 114 S. Ct. at 2320 n.8. The instant matter is obviously dissimilar to *Dolan*, as well as *Nollan*, in that Security is not challenging an adjudicative permit decision (i.e. an "unconstitutional condition case"), but instead suggests

that the County must satisfy a burden of "rough proportionality" whenever a disappointed property owner disputes the application of general zoning regulations to a particular parcel. The adoption of such a standard would render comprehensive zoning impossible, as municipalities would be required to justify every application of zoning to each property owner if challenged. Under *Dolan*, the burden remained with Security and the Complaint, on its face, failed to allege a constitutional taking.

The facts alleged in the Petition to this Court are simply not consistent with those which were contained in the Complaint passed upon at the trial court level. To paraphrase the holding of the Court of Special Appeals of Maryland, Security does not have the constitutional right to have its property rezoned in order to develop it as it wishes. (Petition, o).

## CONCLUSION

The Court of Special Appeals of Maryland correctly followed the holdings of this Court and properly denied Security's not-so-subtle attempt to intimidate the County Council for Baltimore County into agreeing to its re-zoning demands. Only one entity (Security) could possibly benefit from any further review of this matter. Security has failed to show conflict among the courts or any other compelling justification for the issuance of a writ of certiorari.

Respectfully submitted,

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## APPENDIX

Section 1AO3--R.C. (WATERSHED PROTECTION) ZONES [Bill No. 98, 1975; No.178, 1979.]

1A03.1--Findings and Legislative Policy. [Bill No. 98, 1975;178, 1979.]

The county council finds that major, high-quality sources of water supply for the entire Baltimore metropolitan area and for other neighboring jurisdictions lie within Baltimore County and that continuing development in the critical watersheds of those water-supply sources is causing increased pollution and sedimentation in the impoundments, resulting in increasing water-treatment costs and decreasing water-storage capacity. The R.C.4 zoning classification and its regulations are established to provide for the protection of the water supplies of metropolitan Baltimore and neighboring jurisdictions by preventing contamination through unsuitable types or levels of development in their watersheds. [Bill No. 98, 1975; No. 178, 1979.]

1A03.2--Rezoning by petition. [Bill No. 98, 1975; No, 178, 1979.]

No petition for reclassification of property in an R.C. 4 zone may be granted unless a registered professional engineer, architect, landscape architect, or land surveyor first certifies: [Bill No. 98, 1975; No. 178, 1979.]

1. that the parcel of land under petition lies at least 200 feet

from the property line of any public water reservoir; [Bill No. 178, 1979.]

2. that the parcel lies at least 300 feet from any 1st or 2nd order or greater stream that flows directly into a public water reservoir; [Bill No. 178, 1979.]
3. that the parcel lies at least 300 feet from any 3rd order or greater stream that flows directly or indirectly into a public water reservoir; [Bill No. 178, 1979.]
4. that no more than 30% of the parcel has a slope of more than 20%; [Bill No. 178, 1979.]
5. that the parcel does not lie within a 100-year floodplain; and [Bill No. 178, 1979.]
6. that, as shown by an environmental impact statement, the manner in which proposed reclassification will affect water quality in the watershed or any public water reservoir. [Bill No. 178, 1979.]

For the purpose of this subsection, streams are classified by order as shown on the map of stream orders adopted by the Planning Board on March 25, 1976. [Bill No. 178, 1979.]

1A03.3--Use Regulations. [Bill No. 98, 1975.]

A. Uses permitted as of right, The following uses, only are permitted as of right in R.C. 4 zones: [Bill No. 98, 1975.]
    1. Dwellings, one-family detached. [Bill No. 98, 1975.]
    2. Farms and limited-acreage wholesale flower farms

(see Section 404). [Bills No. 98, 1975; No. 51, 1993.]

3. Open space, common. [Bill No. 98, 1975.]

3a. Public schools. [Bill No. 63, 1980; No. 47, 1982; Bill No. 47, 1985.]

4. Telephone, telegraph, electrical-power, or other similar lines or cables-all underground; underground gas, water, or sewer mains or storm drains; other underground conduits except underground interstate and intercontinental pipe lines. [Bill No. 98, 1975.]

5. Trailers, provided that any trailer allowed under this provision must be used or stored in accordance with the provisions of Paragraphs b, c, e, or f of Subsection 415.1 and Subsection 415.2A.1, as applicable. [Bill No. 98, 1975.]

5a. Antennas used by CATV systems operated by companies franchised under Title 2, Article VI, Division 2 of the Baltimore County Code 1978, if situated on property owned by the county, state or federal government or by a governmental agency. [Bill No. 220, 1981.]

5b. Transit facilities. [Bill No. 91, 1990.]

6. Accessory uses or structures, including, but not limited to the following: [Bill No. 98, 1975.]

   a. Excavations, uncontrolled. [Bill No. 98, 1975.]

b. Farmer's roadside stand and produce stand, subject to the provisions of Section 404.4. [Bill No. 98, 1975; Bill No. 41, 1992.]

c. Home occupations. [Bill No. 98, 1975.]

d. Offices or studios of physicians, dentists, lawyers, architects, engineers, artists, musicians, or other professional persons, provided that any such office or studio is established within the same building as that serving as the professional person's primary residence; does not occupy more than 25 per cent of the total floor area of that residence; and does not involve the employment of more than one non-resident employee. [Bills No. 98, 1975; No. 105, 1982.]

e. Parking spaces, including recreational vehicles (subject to the provisions of Section 415A). [Bill No. 98, 1975.]

f. Swimming pools, tennis courts, garages, utility sheds, satellite receiving dishes (subject to Section 429), or other accessory structures or uses (subject to the height and area provisions for buildings as set forth in Section 400). [Bill No. 98, 1975; Bill No. 71, 1987.]

7. Commercial film production, subject to Section 435. [Bill No. 57, 1990.]

B. Uses permitted by special exception. The following uses,

only, are permitted by special exception in R.C. 4 zones: [Bill No. 98, 1975.]

1. Antique shops (subject to the provisions of Section 402B). [Bill No. 98, 1975.]
2. Camps, including day camps. [Bill No. 98, 1975.]
3. Community buildings, swimming pools, or other uses of a civic, social, recreational, or educational nature, including picnic grounds and tennis facilities, provided that no tennis facility shall comprise more than 4 courts (see Section 406A). [Bill No. 98, 1975; No. 62, 1978.]

3a. Churches and other buildings for religious worship. [Bill No. 45, 1982.]

4. Dwellings or other buildings converted to tea rooms or restaurants, as provided in Subsection 402.3. [Bill No. 98, 1975.]
5. Excavations, controlled (subject to the provisions of Section 403) except removal of top soil from the site is expressly prohibited. [Bill No. 98, 1975.]
6. Fish hatcheries. [Bill No. 98, 1975.]
7. Golf courses, country clubs, or other outdoor recreation clubs, and game preserves. [Bill No. 98, 1975.]

7a. Home occupations of disabled persons, where the use is established in a structure originally constructed as a dwelling or as accessory to a dwelling or where the use is established in a

structure that is situated on the same lot as a dwelling, and which the zoning commissioner finds to be compatible with its surrounding neighborhood; provided that:

(1) only three persons including the disabled person and the members of his immediate family who are residents of the dwelling are employed in the use on the premises; and

(2) in any case the use is conducted by a disabled person whose domicile is the dwelling to which the use is accessory and whom the hearing authority finds is so severely disabled as to be unable to engage in his occupation away from the premises of his home.

Any provision of subsection 502.2 to the contrary notwithstanding, any special exception granted pursuant to this item shall expire upon the first to occur of the following:

(1) five years after the issuance of the permit;

(2) the death of a disabled person;

(3) the termination of the disability; or

(4) the failure of the disabled person to permanently reside at the premises.

A new special exception for the use may be granted when the previous special exception expires but only upon the completion of the entire application and hearing process in the same manner as if it were

the initial application for this special exception. It is the purpose of this provision to prevent the use of residential property for business purposes by an occupant other than a disabled person and to ensure that any occupation permitted pursuant to this item will be conducted in a manner appropriate to its surroundings. [Bill No. 27, 1981.]

7b. Horticultural nurseries, subject to the provisions of Section 404.1 and 404.2. [Bill No, 41, 1992.]

7c. Landscape service operations, subject to provisions of Section 404.1 and 404.3 [Bill No. 41, 1992.]

7d. Offices or studios of physicians, dentists, lawyers, architects, engineers, artists, musicians, or other professional persons as an accessory use, provided that any such office or studio is established within the same building as that serving as the professional person's primary -residence; does not occupy more than 25 per cent of the total floor area of that residence; a